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PAULUS & ORS v. LESTARI LTC SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LIM HOCK LENG J
[SUIT NO: BKI-22NCvC-55-8-2022]
12 SEPTEMBER 2024

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Abstract – *(i) Beneficial owners of a land can bring a representative action – even without the consent of the trustee of the land – when it is to enforce possessory rights as opposed to proprietary rights, so long as it does not infringe the special terms in the title deed of the communal title; (ii) Village heads and Jabatan Kerja Raya do not have proprietary or possessory rights over a land; neither is there any evidence that it is vested with any form or authority under the Land Ordinance or any law to grant a legal right to a party to use, enter and occupy a land. In the absence of any legal right to use or occupy a land, the party that unlawfully enters the land is clearly a trespasser.*

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TORT: *Trespass – Wrongful occupation of land – Allegation of – Whether first defendant conferred lawful rights to enter and use land – Whether Jabatan Kerja Raya or village heads lawfully entitled to give permission to first defendant to enter, use and occupy land – Whether essential elements of tort of trespass present – Whether first defendant trespasser on land – Whether damages ought to be awarded*

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LAND LAW: *Trespass – Wrongful occupation of land – Allegation of – Whether first defendant conferred lawful rights to enter and use land – Whether Jabatan Kerja Raya or village heads lawfully entitled to give permission to first defendant to enter, use and occupy land – Whether essential elements of tort of trespass present – Whether first defendant a trespasser on land – Whether damages ought to be awarded*

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CIVIL PROCEDURE: *Action – Representative action – Locus standi – Whether beneficial owners of land could bring representative action without consent of trustee – Enforcement of possessory rights – Whether special terms in communal title displaced locus standi of beneficial landowners to bring action – Whether there was consent by implication with trustee of land named as defendant*

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The plaintiffs were among the 172 beneficial owners/beneficiaries of an undivided parcel of land measuring some 2,000 acres in the District of Tongod in Sabah held under a communal title ('land'). The plaintiffs brought the representative action herein for themselves and the other beneficiaries against the first defendant for trespass in relation to a specific part of the land. On 2 May 2018, the land was alienated to the 172 beneficiaries by the Director of the Lands and Surveys Department who, as the Collector, was named as the trustee. The beneficiaries had shares in the undivided land ranging from 3 to 25 acres, as set out in the title deed. The first defendant

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purported to occupy a part of the land ('subject land') pursuant to a written lease agreement dated 7 August 2018, which was entered into with one Jafray Samin ('DW1') for the monthly rental of RM3,500. Since 16 August 2021, the first defendant had entered the subject land and carried out site clearing and earthworks in furtherance of a road construction project. The first defendant had not asked for or obtained the consent of the plaintiffs or any of the beneficiaries or the second defendant to enter the subject land. The plaintiffs were unhappy with the first defendant's occupation and use of the subject land. On 8 July 2022, they issued a letter of demand to the first defendant to vacate the subject land but to no avail. On 12 July 2022, the plaintiffs sought consent from the Collector of the Lands and Surveys Department as trustee of the land to commence legal action against the first defendant. The Collector did not reply and was named as the second defendant in the representative action. Subsequently, on 26 August 2022, the State Attorney General of Sabah representing the second defendant as the Collector and trustee for the beneficiaries, informed the plaintiffs that the second defendant had filed a memorandum of appearance, but would not file a defence and would abide by the decision of the court. The issues that arose were (i) whether the beneficial owners had the *locus standi* to launch the representation action and procedure; (ii) whether special terms stripped the plaintiffs of *locus standi*; (iii) whether the communal title was surrendered and cancelled; (iv) whether the first defendant was conferred lawful rights to enter and use the subject land; and (v) whether the first defendant had trespassed on the subject land.

Held (ordering accordingly):

(1) This case involved neither an executor/administrator or the right to sell, or to deal with the land or subject land in any way, through a sale or charge, or other form of dealing. Instead, the plaintiffs only sought to enforce their legal right of occupation derived from their possessory rights. In this regard, they need not seek consent from the trustee. The plaintiffs, as beneficial owners of the land, could bring a representative action – even without the consent of the trustee – when it was to enforce possessory rights as opposed to proprietary rights, so long as it does not infringe the special terms in the title deed of the communal title. (paras 29-33)

(2) The special terms in the title deed stated that the beneficiaries have no caveatable interest, and also that which prohibited the beneficiaries from carrying out 'dealings'. However, there were no dealings by the beneficiaries over the land or any part thereof, since there were no sale or encumbrances and like activities which may be classified as dealings. The plaintiffs and other beneficiaries were beneficial owners of the land, though the Collector was the registered owner/trustee. These special

terms in the communal title (including that which stipulated the second defendant was the trustee) did not displace the *locus standi* of the plaintiffs to bring this action. (paras 35 & 37)

(3) The first defendant's point that only the trustee could sue was incorrect and overtaken by events. The plaintiffs had sought the consent of the trustee and named him as the second defendant. The plaintiffs sought consent from the Collector as trustee to commence legal proceedings against the first defendant but the Collector did not respond within the 14-day period accorded to him. Thus, the plaintiffs took out an action against the first defendant as trespasser and against the Collector/trustee as the second defendant. The plaintiffs had rightly added the Collector as the second defendant so as to bind him to such orders as this court may issue. The Collector took the stand that he would be bound by any decision of the court and did not complain of a misjoinder or apply to strike out himself as the second defendant. The Collector may be taken to have given his consent by implication. (paras 38-41)

(4) The first defendant's pleaded case was that the communal title had been surrendered to the Government and cancelled, to be replaced by individual native titles, and the plaintiff's action was an abuse of process. Notwithstanding the endorsement that the title deed was to be surrendered for cancellation and to be replaced by 172 individual native titles, the 172 natives were still the beneficial owners of the land. There had been no memorandum of surrender of the communal title registered. Since the communal title had not been surrendered and cancelled, and it was not the subject of any setting aside application, it continued to be subsisting and valid. (paras 44 & 49)

(5) In respect of the issue whether the village heads or DW1 could confer on the first defendant a legal right to enter the subject land on account of native customary rights or a land application, it is trite that (i) land applications create no rights; and (ii) any claim of native customary rights has to be first brought up before the Collector and then on appeal to the Director before it reaches the High Court which has no original jurisdiction. In respect of the issue as to whether the Jabatan Kerja Raya ('JKR') was lawfully entitled or competent to give permission to the first defendant and its contractor to enter, use and occupy the subject land, the JKR did not have proprietary or possessory rights over the subject land. Neither was there any evidence that it was vested with any form or authority under the Sabah Land Ordinance (Cap 68) ('Land Ordinance') or any law to grant a legal right to the first defendant to use, enter and occupy the subject land. Section 5 of the Land Ordinance, read in the context of the whole legislation, is to be taken to mean that the entire property in and control of State land (or land reserved for a public

purpose) is and shall be vested solely in the Government, with the powers relating thereto exercisable through the State Cabinet or Minister, and generally through the Director or Collector. These powers or authority were not vested in the village heads such as the Ketua Kampung Kelompok or Ketua Kampung Induk or JKR. (paras 50-64)

(6) In the absence of any legal right to use, enter and occupy the subject land, and since it was an agreed fact that none of the beneficiaries or the plaintiffs or the second defendant gave the first defendant such right or permission, the first defendant was clearly a trespasser on the subject land. The essential elements of the tort of trespass were present in this case. (paras 65 & 67)

(7) While a plaintiff may not have suffered actual loss from the loss of opportunity to use the land, he could nonetheless recover a reasonable rent for the duration of the trespass. For damages, the plaintiffs asked for RM3,000 per month benchmarked against the monthly rent of RM3,500 charged by DW1 for the first defendant's use and occupation of the subject land/land which was leased under the purported lease agreement. Since the plaintiffs were asking for less than what the first defendant was purportedly paying DW1 by way of monthly rent, this could not be construed as unfair or unreasonable. The first defendant was ordered to pay damages of RM3,000 per month from 16 August 2021 till the date of delivery of vacant possession of the subject land. No aggravated or exemplary damages were awarded. (paras 74-76)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Burhan Ating & Ors v. Director Of Lands & Surveys & Ors [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 HC ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***

Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors [2011] 6 CLJ 733 CA ***(refd)***

Duke Of Bedford v. Ellis [1901] AC 1 ***(refd)***

Hasilharta (Malaysia) Sdn Bhd v. Ideal Advantage Sdn Bhd & Anor [2022] CLJU 2737; [2022] 1 LNS 2737 HC ***(refd)***

How Kem Chin v. L & L Glass Aluminium Trading Sdn Bhd & Ors [2016] MLJU 1807 ***(refd)***

Inverugie Investments Ltd v. Hackett [1995] 1 WLR 713 ***(refd)***

Ismail Yunus & Ors (For Themselves And On Behalf Of Ors) v. Syarikat Kerjasama Perkembangan Tanah Pagagau Berhad & Anor [1994] 4 CLJ 701 HC ***(refd)***

John Until & Ors v. Prolific Yield Sdn Bhd & Anor [2024] 5 CLJ 789 HC ***(refd)***

Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 HC ***(refd)***

Lee Ah Thaw v. Lee Chung Tek [1978] 1 MLJ 173 ***(refd)***

Malayan Banking Bhd v. Chairman Sarawak Housing Developers' Association [2014] 6 CLJ 409 FC ***(refd)***

Markt & Co v. Knight Steamship Co Ltd [1910] 2 KB 1039 ***(refd)***

Mestarico Sdn Bhd v. Yaakub Ismail & Ors [2021] CLJU 2439; [2021] 1 LNS 2439 HC ***(refd)***
Narinder Kaur v. Deyoh Opong & Ors [1997] 2 CLJ 895 HC ***(refd)***
Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors [1986] CLJU 124; [1986] 1 LNS 124 HC ***(refd)***
Peninsular Home Sdn Bhd v. Ko Lim Tristar Sdn Bhd [2024] 3 CLJ 1 CA ***(refd)***
Sa-Mal (Sabah) Corporation Sdn Bhd v. Director Of Lands And Surveys, Sabah [1994] 3 CLJ 229 HC ***(refd)***
Smith & Others v. Cardiff Corporation [1954] 1 QB 21 ***(refd)***
Tatalaan Plantation Sdn Bhd & Anor v. Barahim Andipoh & Ors [2023] 9 CLJ 315 HC ***(refd)***
Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC ***(refd)***
The State Government Of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors [2017] 2 CLJ 379 CA ***(refd)***
Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd [2013] 2 CLJ 910 FC ***(refd)***
Uda Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2009] 1 CLJ 329 FC ***(refd)***
Workon Sdn Bhd v. The Director Of Lands And Surveys, Sabah & Ors [1999] CLJU 40; [1999] 1 LNS 40 HC ***(refd)***
Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor And Dekor Panel Emas Sdn Bhd (Intervener) [1994] 3 CLJ 265 HC ***(refd)***

Legislation referred to:
Land Ordinance (Sabah) (Cap 68), ss. 4, 5, 9, 14, 41(1), (2), 76
Rules of Court 2012, O. 15 r. 12

Other source(s) referred to:
Supreme Court Practice 1995, Part 1, vol 1, p 243, para 15/14/3

For the 1st, 2nd & 3rd plaintiffs - Kong Hong Ming; M/s Lee & Kong
For the 1st defendant - Norbert Chin; M/s Norbert Chin & Co
For the 2nd defendant - Jabatan Peguam Besar Negeri Sabah

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Hock Leng J:

Introduction/Agreed Facts

[1] The first, second and third plaintiffs will be collectively referred to as the plaintiffs. They are among the 172 beneficial owners/beneficiaries of an undivided parcel of land measuring some 2,000 acres in the District of Tongod in Sabah held under a communal title held *vide* Field Register Title No. 254000087 ("the land").

[2] The plaintiffs bring the representative action herein for themselves and the other beneficiaries against the first defendant for trespass in relation to a specific part of the land.

[3] On 2 May 2018, the land was alienated to the 172 beneficiaries by the Director of the Lands and Surveys Department, who as the Collector, was named as the trustee. The beneficiaries had shares in the undivided land ranging from 3 to 25 acres, as set out in the title deed.

[4] The first defendant purported to occupy a part of the land ("the subject land") pursuant to a written lease agreement dated 7 August 2018 which was entered into with one Jafray Samin ("DW1") for the monthly rental of RM3,500.

[5] It is also an agreed fact that, since 16 August 2021, the first defendant had entered the subject land and carried out site clearing and earthworks in furtherance of a road construction project.

[6] It is further an agreed fact that the first defendant had not asked for or obtained the consent of the plaintiffs or any of the beneficiaries or the second defendant to enter the subject land.

[7] The plaintiffs were unhappy with the first defendant's occupation and use of the subject land.

[8] On 8 July 2022, they issued a letter of demand to the first defendant to vacate the subject land but to no avail.

[9] On 12 July 2022, the plaintiffs sought consent from the Collector of the Lands and Surveys Department as trustee of the land to commence legal action against the first defendant.

[10] The Collector did not reply within 14 days as requested.

[11] The Collector was then named as the second defendant in the representative action.

[12] By a letter dated 26 August 2022, the State Attorney, General of Sabah representing the second defendant as the Collector and trustee for the beneficiaries, informed the plaintiffs' solicitors that the second defendant had filed a memorandum of appearance, but would not file a defence and would abide by the decision of the court.

[13] By virtue of the agreed facts, the issues fall within a narrow compass.

Issues

[14] There are eight agreed issues but some of them may be grouped together.

Whether Beneficial Owners Have Locus Standi To Launch Representation Action, And Procedure

[15] The first of the agreed issues is whether the plaintiffs and the other beneficiaries are the legal and beneficial owners of the respective shares in the land earmarked for them in the communal title. A perusal of the title deed will show that they are the beneficial owners of the respective shares shown against their names, while the Collector is named as the trustee below the description "owner(s)."

[16] Although not specifically set out in the statement of agreed issues for trial ("SAIT"), the legal issue or threshold question of law here is whether the plaintiffs have *locus standi* as beneficial owners to bring the representative action on behalf of the other beneficiaries of the land which is undivided *albeit* with a certain acreage earmarked for each beneficiary, although the Collector is the trustee.

[17] A corollary legal issue is whether the right procedure had been adopted, with the Collector-*qua*-trustee named as the second defendant.

Representative Action: Requirements

[18] In *Duke Of Bedford v. Ellis* [1901] AC 1, where the plaintiffs were asserting their statutory rights as growers and vendors of flowers and agricultural produce in the market owned by the Duke of Bedford, who imposed what were perceived to be discriminatory rates in favour of middlemen, Lord Macnaghten held:

> The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party the rule was not allowed to stand in the way.
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> It was originally a rule of convenience; for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit is in order if the relief sought was in its nature beneficial to all whom the plaintiff proposes to represent.

[19] Lord Shand expanded on the rationale in the following manner: … the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant.

[20] In *Smith & Others v. Cardiff Corporation* [1954] 1 QB 210, the Court of Appeal similarly held that there are three pre-requisites for a representative action.

[21] In *Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors* [1986] CLJU 124; [1986] 1 LNS 124, Zakaria Yatim J (as he then was) followed these cases and held: "It is clear from *Duke of Bedford*'s case and *Smith*'s case that the plaintiff has to satisfy three requirements in order to succeed in a representative action. Firstly, the plaintiff and those represented by it are members of a class and that these members have a common interest. Secondly, the plaintiff and those it represents have a common grievance. Thirdly, the relief sought is in its nature beneficial to them all."

[22] These views on the pre-requisites for a representative action have been adopted by various courts, including the Federal Court in *Malayan Banking Bhd v. Chairman Sarawak Housing Developers' Association* [2014] 6 CLJ 409; [2014] 5 MLJ 169, and most recently by the Sandakan High Court in *John Until & Ors v. Prolific Yield Sdn Bhd & Anor* [2024] 5 CLJ 789.

[23] The plaintiffs here need not obtain the consent of all the other beneficiaries. In *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169; [1990] 3 MLJ 427, Haidar J (as he then was) held, following *Markt & Co v. Knight Steamship Co Ltd* [1910] 2 KB 1039, that "a plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent, and they are not liable for costs, though by estoppel or *res judicata* they will be bound by the result of the case."

[24] The pre-requisites are set out in O. 15 r. 12, Rules of Court 2012.

General Principle That Only The Trustee Can Sue

[25] I now turn to consider the defendant's contention that only the trustee can sue and the beneficiaries cannot do so in their own name. Learned counsel for the first defendant cited the Federal Court's decision in *Lee Ah Thaw v. Lee Chung Tek* [1978] 1 MLJ 173, 176 that the "testator's property was vested in his executor for the purpose of administration of the estate and no one else has any property interest on such property". Also cited was *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; [1997] 3 MLJ 188, 196, where the Federal Court held:

> … in law, a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate.

[26] Learned counsel for the first defendant was mindful that these cases involved an executor/administrator, and also cited cases concerning the sale of trust properties. In *Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor And Dekor Panel Emas Sdn Bhd (Intervener)* [1994] 3 CLJ 265, Shankar J (as he then was) held that it is trite law that only the legal owner has the right to sell the land but not the beneficiaries.

[27] The court's attention was also drawn to *Tatalaan Plantation Sdn Bhd & Anor v. Barahim Andipoh & Ors* [2023] 9 CLJ 315, where Leonard Shim J held, referring to the special terms in the title deed: "Under the law, it is trite that beneficiaries under a trust have no capacity, authority or rights to enter into agreement in respect of trust property." In that case, there was a special term in the communal title that prohibited dealings over the land.

A *Beneficial Owners Can Sue Without Consent From Trustee Concerning Possessory Rights*

[28] Now, the present case involves neither an executor/administrator or the right to sell, or to deal with the land or subject land in any way, through a sale or charge, or other form of dealing.

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[29] Instead, the plaintiffs only seek to enforce their right of occupation derived from their possessory rights. In this regard, they need not seek consent from the trustee.

[30] In *Hasilharta (Malaysia) Sdn Bhd v. Ideal Advantage Sdn Bhd & Anor* C [2022] CLJU 2737; [2022] 1 LNS 2737; [2022] MLJU 2974, Hayatul Akmal Abdul Aziz J held that a person having exclusive possession over land may sue for trespass. It need not be the landowner as the registered owner does not necessarily have actual possession.

[31] To illustrate the point, a landlord may be the registered proprietor of D a property, but typically the tenant is given exclusive possession/occupation of the demised property and the landlord cannot even enter except in limited circumstances, for instance, to carry out repairs.

[32] What is crucial is who has possession or occupational rights, not ownership. Reference may be made to *How Kem Chin v. L & L Glass* E *Aluminium Trading Sdn Bhd & Ors* [2016] MLJU 1807, where Su Geok Yiam J held that "(trespass) arises when one person enters on land in the possession of another person without lawful justification. Every unlawful entry on land in the possession of another person gives rise to a cause of action for trespass."

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[33] This court is of the view that the plaintiffs, as beneficial owners of the land, can bring a representative action – even without the consent of the trustee – when it is to enforce possessory rights as opposed to proprietary rights, so long as it does not infringe the special terms in the title deed of the communal title.

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[34] Learned counsel for the plaintiffs cited a passage in the Supreme Court Practice, 1995, vol. 1, Part 1, p. 243, para. 15/14/3, which the court finds persuasive:

> Action by beneficiary without joinder of trustees – The proper plaintiffs H are normally the persons in whom the legal right infringed is vested: but **an equitable owner, *eg*, a beneficiary under a trust, may have such possession (see *The Winkfield* [1902] P.42) as enables him to maintain an action, *eg*, in trespass** or detinue (see *Healey v. Healey* [1915] 1 KB 938). Where trustees refuse to sue, beneficiaries may sue after request and refusal; but not otherwise (*Franklin v. Franklin* [1915] WN 342); the I trustees must be added as defendants where the legal title is involved. (emphasis added)

Whether Special Terms Strip The Plaintiffs Of Locus Standi

[35] Next, I do not think special terms in the title deed which the first defendant are of help to its case. It referred to the special term that the beneficiaries have no caveatable interest, and also that which prohibited the beneficiaries from carrying out "dealings." However, there are no dealings by the beneficiaries over the land or any part thereof, since there are no sales or encumbrances and like activities which may be classified as dealings. The plaintiffs and other beneficiaries are beneficial owners of the land, though the collector is the registered owner/trustee.

[36] The first defendant also referred to the special term as follows: "The beneficiaries shall at all times comply with the directions of the Collector in relations to the use and occupation of the said land by the beneficiaries and their families and also in all matters relating to rights of way, drainage, irrigation canal, bridges or any other easements and allocation of lots shall determine any lot boundary disputes." There is no merit in that contention. There was no evidence that the plaintiffs had failed to comply with any directions from the Director as to the occupation and use of the land. If at all there was any such non-compliance, it would be a matter between the Lands and Surveys Department and the plaintiffs or beneficiaries.

[37] These special terms in the communal title (including that which stipulates the second defendant is the trustee) do not displace, for the reasons given, the *locus standi* of the plaintiffs to bring this action.

Alternatively, Consent By Implication/Correct Procedure With Trustee Named As Second Defendant

[38] In any case, the first defendant's point that only the trustee can sue is incorrect and overtaken by events. Even if the plaintiffs cannot bring a representative action for trespass without seeking the consent of the Collector as trustee, they have sought the consent of the trustee and named him as the second defendant.

[39] It would appear that out of caution, the plaintiffs had, by letter dated 12 July 2022, sought consent from the Collector as trustee to commence legal proceedings against the first defendant. The Collector did not respond within the 14-day period accorded to him.

[40] It was thus that the plaintiffs took out an action on 1 August 2022 against the first defendant as trespasser, and against the Collector/trustee as the second defendant. In adding the Collector as the second defendant, such rights of his as may be affected could be addressed by him. The plaintiffs had rightly added the Collector as the second defendant so as to bind him to such orders as this court may issue.

[41] The Collector, having entered appearance, took the stand through the State Attorney General's Chambers on 28 August 2022 that he would be bound by any decision of the court. He did not complain of a misjoinder or

apply to strike out himself as the second defendant. This court is in agreement with learned counsel for the plaintiffs that the Collector may be taken to have given his consent by implication.

Whether Communal Title Surrendered And Cancelled

[42] Another issue raised by the first defendant was whether the communal title had been replaced by the Director of Lands and Surveys with individual titles in accordance with the Cabinet's decision on 5 August 2018 as per the endorsement on the title deed *vide* memorial number MD2001250005 dated 21 January 2020. The endorsement reads:

> Selaras dengan keputusan Jemaah Menteri Siri 15/2018 pada 08 Ogos 2018 geran komunal yang terletak di Tongod diserahkan kepada Kerajaan untuk dimansuhkan dan diganti dengan geran anak negeri individu yang tidak boleh dicagarkan, dipindah atau diserahkan kepada pihak lain dan tidak boleh diurus melalui peguam.

[43] The first defendant's pleaded case is that the communal title has been surrendered to the Government and cancelled, to be replaced by individual native titles, and the plaintiffs' action is an abuse of process.

[44] Notwithstanding the endorsement that the title deed is to be surrendered for cancellation and to be replaced by 172 individual native titles, the 172 natives are still the beneficial owners of the land. There has been no memorandum of surrender of the communal title registered.

[45] Marcus Ansun, the Assistant Collector of Land Revenue in Tongod (PW1) since 2020, testified that the Field Register no. 254000087 shows the first plaintiff is the registered beneficial owner of 25 acres, the second plaintiff is the registered beneficial owner of 20 acres, while the third plaintiff is the registered beneficial owner of 25 acres.

[46] In fact, PW1 gave uncontroverted evidence that the communal title "has not been surrendered or cancelled pending the said subdivision of the said land." He confirmed that "the communal title to the said land in Field Register No. 254000087 is still valid and existing." He went on to say: "The communal title to the said land will be surrendered for cancellation in due course for the purpose of the subdivision of the said land into 172 subdivided lots to be issued with individual native titles to each of the beneficiaries as the registered owner of each subdivided lot thereof." See WSPW1, paras. 18 to 20.

[47] The reproduced testimony of PW1 was not challenged in cross-examination and as the evidence is not inherently implausible but credible and borne out of personal knowledge, the court accepts it as true. See *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639.

[48] Learned counsel for the plaintiffs referred to *Mestarico Sdn Bhd v. Yaakub Ismail & Ors* [2021] CLJU 2439; [2021] 1 LNS 2439, where Justice Leonard Shim, relying on the Federal Court's decision in *Uda Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2009] 1 CLJ 329, held:

> As the Plaintiff's title to the said land is a land instrument issued under the Sabah Land Ordinance, and the title has not been quashed or set aside by the Court, it remains valid and effective.

[49] Similarly, since the communal title in this case has not been surrendered and cancelled and it is not the subject of any setting aside application, it continues to be subsisting and valid.

Whether First Defendant Was Conferred Lawful Rights To Enter And Use The Subject Land

[50] In respect of the issue of whether the village heads or one Jafray Samin/DW1 could confer on the first defendant a legal right to enter the subject land on account of native customary rights or a land application, it is trite that (i) land applications create no rights, and (ii) any claim of native customary rights has to be first brought up before the Collector and then on appeal to the Director before it reaches the High Court which has no original jurisdiction.

[51] Rule 2(4) of the Land Rules 1954 makes it clear that the payment of a fee on submission of a land application or a survey fee shall not confer any right whatsoever to the land applied for. In *The State Government Of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors* [2017] 2 CLJ 379; [2017] 3 MLJ 127, the Court of Appeal held:

> It is plain and clear that **s. 12 of the Sabah Land Ordinance** and **r. 2 of the Sabah Land Rules** do not recognise mere application for land and any payment made pursuant thereto as an undertaking that, the application for land has been approved. Any land title can only be issued after the land has been properly surveyed **(s. 22)** and any use or occupation of land cannot be allowed before completion of survey unless so authorised by the collector upon issuance of a provisional lease. And under **s. 88**, it is clearly provided that any interest in land shall be valid only upon registration of title. (emphasis added)

[52] Further, this court is not seized of original jurisdiction to hear claims based on native customary rights or the exercise of the Director's discretion not to alienate land to such claimants or for that matter, any land applicant. The Land Ordinance, s. 14, stipulates: "Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and **shall be decided by the Collector** (emphasis added)."

[53] In *Burhan Ating & Ors v. Director Of Lands & Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211, Ian Chin J held that "the Collector has been empowered to decide on claims for native customary rights and been empowered to decide whether to pay compensation or to issue title to the

successful claimant of native customary rights and provisions exist for appeal against such decision of the Collector with the final appeal going to the High Court in Borneo."

[54] Section 41(1) of the Land Ordinance confers only appellate jurisdiction on the courts, while s. 41(2) states that, except as therein expressly provided, "no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to a Collector or the Director."

[55] To be clear, the Federal Court in *Tio Chee Hing v. United Oversea Bank (Malaysia) Bhd* [2013] 2 CLJ 910 held: "... s. 41 of the Sabah Land Ordinance (Cap 68) clearly legislates that (similar to the Income Tax Act) an appeal shall lie from any order or decision of the Director, whether original or an appeal, to the court. Section 4 of this Ordinance provides that "court" means the "High Court". It is succinctly legislated in s. 41 that no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by the Sabah Land Ordinance (Cap 68) to the Director. Certainly, it bars the High Court from exercising an original jurisdiction thus leaving it only an appellate jurisdiction (*Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors* [2011] 6 CLJ 733; *Burhan Ating & Ors v. Directors Of Lands & Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211; *Ismail Yunus & Ors (For Themselves And On Behalf Of Ors) v. Syarikat Kerjasama Perkembangan Tanah Pagagau Berhad & Anor* [1994] 4 CLJ 701)."

[56] So far as others may say the subject land – through native customary rights or otherwise – ought to have been alienated to them, the Director of the Lands and Surveys Department has virtually unfettered discretion subject only to the State Cabinet's directions. Section 9 of the Land Ordinance provides that "(s)ubject to any general or special direction of the Cabinet the Director (of the Lands & Surveys Department) may alienate State land on such terms or in such manner as is authorised by this Ordinance and may also impose special conditions ...".

[57] Subject to any overriding Cabinet direction, the Director has a discretion to alienate land to whoever he deems fit, for policy reasons. He is under no duty to alienate land to any particular person. That discretion is subject only to the exception of a Cabinet direction. In *Workon Sdn Bhd v. The Director Of The Lands & Surveys, Sabah & Ors* [1999] CLJU 40; [1999] 1 LNS 40; [1999] 4 MLJ 177, Malanjum J (as His Lordship then was) held that "s. 9 of the Ordinance imposes only discretion upon the respondent and not a duty." See also *Sa-Mal (Sabah) Corporation Sdn Bhd v. Director Of Lands And Surveys, Sabah* [1994] 3 CLJ 229; [1994] 1 MLRH 571.

[58] So far as the issuance of the communal title and allegations concerning its issuance are concerned, s. 76 of the Land Ordinance states:

> In cases where any State land planned by the Government for the natives of Sabah or a claim to customary tenure of land has been established or a claim to native customary rights has been dealt with by a grant of land and such land is to be held or is held for the common use and benefit of natives and is not assigned to any individual as his private property, it shall be lawful for the Minister to sanction a communal native title for such land to be issued in accordance with the relevant provisions of this Ordinance in the name of the Collector as trustee for the natives concerned but without power of sale and such communal native title shall be held to be a title under this Part, but shall be subject to such rent as the Minister may order.

[59] There is no counterclaim by the first defendant – adding the Minister as a party – to challenge or set aside the communal title. Whether or not all or certain of the beneficial owners are entitled to the rights under the communal title is not in issue. The evidence of DW2, DW3, DW4, and DW5, the thrust of which is that they objected to the issuance of the communal title to the beneficiaries, who they alleged were outsiders, is thus irrelevant.

[60] In any event, it was only after the issuance of the communal title that PW1 (the ACLR) learnt of a potential claim for native customary rights through a letter he received on 15 February 2023 from the District Chief of Tongod Native Court Office, which referred to an inspection report initiated by Samun bin Unau. Put another way, there was no claim of native customary rights over the subject land before the communal title was registered on 2 May 2018.

[61] Even if there were any such claims prior to the registration of the communal title, they would have been extinguished. In *Narinder Kaur v. Deyoh Opong & Ors* [1997] 2 CLJ 895, Ian Chin J held: "Unless the issue of the title is assailed, the title to the said land extinguished whatever native customary rights that may have existed prior to the issue of the title." Justice Ian Chin went on to hold that native customary rights cannot be asserted on land that had already been alienated, although it is a different matter concerning State land.

[62] In respect of the issue of whether the Jabatan Kerja Raya ("JKR") was lawfully entitled or competent to give permission to the first defendant and its contractor to enter, use, and occupy the subject land for constructing workers' quarters, and to store plant and machinery thereon, the first defendant's contention has to be given short shrift.

[63] The JKR clearly does not have proprietary or possessory rights over the subject land. Neither is there any evidence that it is vested with any form of authority under the Land Ordinance or any law to grant a legal right to the first defendant to use, enter and occupy the subject land.

[64] Section 5 of the Land Ordinance, read in the context of the whole legislation, is to be taken to mean that the entire property in and control of State land (or land reserved for a public purpose) is and shall be vested solely in the Government, with the powers relating thereto exercisable through the State Cabinet or Minister, and generally through the Director or Collector. These powers or authority are not vested in the village heads such as the Ketua Kampung Kelompok or Ketua Kampung Induk, or JKR.

Whether The First Defendant Had Trespassed On The Subject Land

[65] In the absence of any legal right to use, enter and occupy the subject land, and since it is an agreed fact that none of the beneficiaries or the plaintiffs or the second defendant gave the first defendant such right or permission, the first defendant was clearly a trespasser on the subject land.

[66] On the essential elements of the tort of trespass, I would draw upon the succinct decision of Malik Ishak J (as His Lordship then was) in *Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657:

> The tort of trespass to land or what is known as *trespass quare clausum fregit* consists of three significant factors. Firstly, it is the act of entering upon land in the possession of another – here it would be the plaintiff as against the defendant who is the trespasser. Secondly, having entered upon such land the trespasser continues to remain on the land. Thirdly, the trespasser placing or projecting any object upon such land. It must be emphasised that in each case, the entry is without lawful justification (*Barker v. The Queen* [1983] 153 CLR 338, 356).

[67] It is readily apparent that the three essential elements of the tort of trespass are present in this case, both from the agreed facts as set out earlier in paras. 4, 5, and 6 and the trial evidence of DW1, who was merely a land applicant who had no legal standing to permit the entry, occupation and use of the subject land by the first defendant, which did not give evidence through anyone from its Board or management or staff.

[68] The argument that there was no approved survey plan to show the area of trespass is unmeritorious in the light of the agreed facts as reproduced as follows:

> 9. By a written agreement dated 07.08.2021 made between one Jafray Samin purportedly as the owner of an area of land located within the said land held in Field Register Title No. 254000087 ("the said subject land") and the 1st Defendant purportedly as sub-lessee of the said subject land at the rent of RM3,500.00 per month payable by the 1st Defendant for a period from 16.08.2021 until the completion of the Project.
>
> 10. Since 16.08.2021, the 1st Defendant had entered the said subject land and had carried out site clearing and earthworks at the said subject land.

11. The 1st Defendant had built on the said subject land with blocks of buildings consisting of wooden structure, workers quarters and an office building.

12. Since 16.08.2021, the 1st Defendant has been occupying and using the said subject land for the purposes of the buildings and to keep its heavy plants, machineries and trucks.

13. The 1st Defendant or the said Jafray Samin did not at any time apply or obtain the permission or consent from the Beneficiaries or the Plaintiffs or any of them or the 2nd Defendant as the Collector or the Assistant Collector of Land Revenues of Tongod to enter the said land or any part thereof.

[69] Apart from the agreed facts, DW1 gave evidence that the first defendant had carried out site clearing and earthworks on the subject land and built on it. He confirmed that the buildings and structures on the subject land, as shown in the photographs in CBOD Part B, pp. 90 to 93, were put up by the first defendant. DW1 also confirmed that CBOD Part B, p. 92, showed trucks and machineries kept by the first defendant on the subject land. DW1 was the sole witness for the defence testifying on the use and occupation of the subject land by the first defendant, which did not offer any witnesses from its Board, management or staff.

[70] The first defendant knew that it had trespassed on the subject land before the plaintiffs filed the representative action on 1 August 2022.

[71] On 16 June 2022, the first plaintiff (PW2) had given the first defendant's site manager, one Renato Naizaro @ Roy, a copy of the communal title, who sought to explain that it was Samun bin Unau, a village head, who let the first defendant occupy and use the subject land.

[72] Further, the plaintiffs' solicitors had sent the first defendant a letter dated 8 July 2022 to yield possession of the subject land but to no avail. See WSPW2, paras. 20 to 22. There was no cross-examination of PW2's testimony regarding the handover of the title deed and meeting with the first defendant's site manager and it would have to be taken as true as it was not inherently incredulous. See *Aik Ming (M) Sdn Bhd* (*supra*). As for the pre-action letter of demand, the first defendant in its defence admitted receiving it.

Conclusion And Orders

[73] For damages, the plaintiffs asked for RM3,000 per month benchmarked against the monthly rent of RM3,500 charged by DW1 for the first defendant's use and occupation of the subject land/land, which was leased under the purported lease agreement dated 7 August 2021.

[74] In the seminal case of *Inverugie Investments Ltd v. Hackett* [1995] 1 WLR 713, the Privy Council was of the view that while a plaintiff may not have suffered actual loss from the loss of opportunity to use the land, he could nonetheless recover a reasonable rent for the duration of the trespass.

[75] Since the plaintiffs were asking for less than what the first defendant was purportedly paying DW1 by way of monthly rent, I do not see how that can be construed as unfair or unreasonable. While the rental has to be subjected to deductions that a plaintiff would have to pay to obtain the rental, such as quit rent (see the decision of the Court of Appeal in *Peninsular Home Sdn Bhd v. Ko Lim Tristar Sdn Bhd* [2024] 3 CLJ 1, para. 38), the plaintiffs here have voluntarily asked for a smaller sum and there is no evidence that its expenses to generate rental cost more than the difference of RM500 per month.

[76] The court ordered that the first defendant to pay damages of RM3,000 per month from 16 August 2021 till the date of delivery of vacant possession of the subject land. No aggravated or exemplary damages were awarded.

[77] As the plaintiffs were suing on behalf of themselves and all the other beneficiaries, the damages are to be distributed between all of them since the land/subject land is still undivided.

[78] The court granted a declaration that the beneficiaries represented by the plaintiffs are entitled to possession of the subject land, and declarations that the first defendant is not entitled to enter the subject land and it shall deliver up vacant possession.

[79] An injunction was issued to restrain the first defendant – whether by themselves or otherwise – from entering or using the subject land and from remaining or carrying out work or activities thereon.

[80] The first defendant was ordered to clear and remove all their belongings from the subject land and to deliver up vacant possession of the subject land. It is to pay the plaintiffs the survey costs of RM7,738 relating to the subject land.

[81] Interest at the rate of 5% per annum is to run on damages of RM3,000 per month from 16 August 2021 till the date of vacant possession and full payment.

[82] Lastly, the first defendant is to pay the plaintiffs costs of RM25,000 subject to payment of the allocatur fee. No order as to costs as against the second defendant who did not participate in the proceedings save for filing the memorandum of appearance and agreeing to abide by the court's decision.